STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

WILLIAM JERMICHAEL CARTER,
Defendant-Appellant.

Supreme Court No.

COA No. 260369

Lower Ct. No. 99-04389-FC

Kent J. Redford

129614

APPL

11/8

NOTICE OF HEARING
APPLICATION FOR LEAVE TO APPEAL
DOCKET ENTRIES
ORDER DENYING APPLICATION FOR LEAVE TO APPEAL
OPINION AND ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT
BRIEF IN SUPPORT OF APPLICATION FOR LEAVE
EXHIBITS IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL
PROOF OF SERVICE

B39683

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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No.
COA No. 260369
Circuit Ct. No. 99-04389-FC

vs

WILLIAM JERMICHAEL CARTER,

Defendant-Appellant
_____/

APPLICATION FOR LEAVE TO APPEAL

NOW COMES WILLIAM JERMICHAEL CARTER, Defendant-Appellant herein, by and through his attorney, CAROLE M. STANYAR, and requests this Honorable Court for an order, pursuant to MCR 7.302, for an order granting his application for leave to appeal from the Michigan Court of Appeals' decision denying his application for leave to appeal the trial court's denial of his motion for relief from judgment pursuant to MCR 6.500. In support of his application, Defendant-Appellant states as follows

1. Defendant-Appellant William Jermichael Carter was originally charged in Kent County Circuit Court, No. 99-04389-FC, with second degree murder, contrary to MCL 750.317, and driving while license suspended, contrary to MCL 257.904A.

2. On November 9, 1999, following a jury trial before the Honorable David H. Soet, Mr. Carter was convicted of second-degree murder and driving without a license.

3. On December 28, 1999, Mr. Carter was sentenced to a term of 24 to 45 years imprisonment for the murder conviction and to time served for driving without a license.

4. Mr. Carter appealed as of right to the Michigan Court of Appeals, and his conviction was affirmed in an unpublished opinion entered on January 11, 2002 (COA No. 225049).

5. Mr. Carter's application for leave to appeal in the Michigan Supreme Court was denied on September 30, 2002, and his motion for reconsideration and supplemental motion for reconsideration were denied on December 30, 2002. (Supreme Court No. 121125).

6. On August 5, 2003, Mr. Carter filed a timely motion for relief from judgment before the Honorable James R. Redford, who replaced Judge Soet as the judge assigned to this matter. The motion raised the following claims.

> A. THE DEFENDANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO BE SENTENCED ON THE BASIS OF ACCURATE INFORMATION WHERE THE SENTENCING COURT SCORED OFFENSE VARIABLE 3 IMPROPERLY AT 100 POINTS, EXPOSING THE DEFENDANT INCORRECTLY TO A HIGHER SENTENCE RANGE.
>
> B. THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AT SENTENCE AND ON APPEAL.

7. On July 20, 2004, Judge Redford issued a written opinion and order denying the motion for relief from judgment.

8. On August 4, 2004, Mr. Carter filed a motion for reconsideration of the order denying his motion for relief from judgment. In the alternative, Mr. Carter requested a ruling on the merits as to his claim that counsel at sentencing and on appeal were ineffective in failing to raise the issue with respect to sentencing offense variable 3. Finally, he requested reconsideration in light of the recent Supreme Court decision in Blakely v Washington, 542 US __, 124 SCt 2531 (2004).

9. On December 14, 2005, Judge Redford denied the foregoing requests for reconsideration in a written opinion and order.

10. Defendant filed his timely application for leave to appeal to the Michigan Court of Appeals on January 20, 2005. His application was denied in an order entered on August 16, 2005.

11. Mr. Carter is presently unlawfully confined at the Riverside Correctional Facility in Ionia, Michigan under the jurisdiction of the Michigan Department of Corrections.

12. Leave to appeal should be granted in this case for the following reasons:

> A. THE DEFENDANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO BE SENTENCED ON THE BASIS OF ACCURATE INFORMATION WHERE THE SENTENCING COURT SCORED OFFENSE VARIABLE 3 IMPROPERLY AT 100 POINTS, EXPOSING THE DEFENDANT INCORRECTLY TO A HIGHER SENTENCE RANGE; AND THE DEFENDANT IS ENTITLED TO A RESENTENCING WHERE THE OV-3 ISSUE WAS NEVER SUBMITTED TO A JURY FOR DETERMINATION, AND WHERE THE PROSECUTION FAILED TO DEMONSTRATE THIS FACT BEYOND A REASONABLE DOUBT.
>
> B. THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AT SENTENCE AND ON APPEAL.

13. These grounds for relief have not been raised previously.

14. Defendant meets all of the requirements of MCR 6.500. His reason for not raising the above claims previously is that appellate counsel on direct appeal was constitutionally ineffective. As expressed in the attached memorandum of law, these arguments may properly be raised for the first time on the collateral appeal of the defendant's conviction and sentence. Massaro v United States, 538 US 500, 123 SCt 1690, 155 LEd2d 714 (2003). A defendant establishes "cause", under MCR 6.508(D)(3), for his failure to raise an issue on his direct appeal where, during his collateral appeal, the defendant raises a meritorious claim that his appellate counsel was ineffective under the standards set forth in Strickland v Washington, 466 US 668, 104 SCt 2052, 80 LEd2d (1984). See People v Reed, 449 Mich 375, 380-381, 390 (1995); Byrd v Collins, 209 F3d 486, 524 (6th Cir 2000).

15. This appeal satisfies the "significant public interest" prong of MCR 7.302(B)(2) warranting

review by this Court because it raises the important question of whether under the Michigan Sentencing Guidelines, in the crimes against persons category, offense variable 3 should properly be scored at zero where the offense of conviction is a homicide. There has been substantial confusion in the lower courts as to this variable, with the latest (and only published) Court of Appeals opinion holding that zero is the appropriate scoring. People v Brown, 265 Mich App 60 (2005). Mr. Carter was scored at 100 points. The Court of Appeals decision on his 6.500 appeal was rendered after the Brown decision. The Court of Appeals panel deciding his case erred in not following Brown, the controlling decision on this issue. See MCR 7.215(C)(2). Mr. Carter had supplied the Court of Appeals with the Brown decision in a "Supplemental Authority" filing properly under MCR 7.212(F).

WHEREFORE, Defendant-Appellant William Jermichael Carter prays for an order granting his application for leave to appeal from the Michigan Court of Appeals' decision denying his application for leave to appeal the trial court's denial of his motion for relief from judgment pursuant to MCR 6.500.

Respectfully submitted,

Dated: October 3, 2005,

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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee, Supreme Court No.

vs COA No. 260369

WILLIAM JERMICHAEL CARTER, Lower Ct. No. 99-04389-FC
Defendant-Appellant.
_____/

BRIEF IN SUPPORT OF APPLICATION FOR LEAVE

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STATEMENT OF THE BASIS OF JURISDICTION

This Court's jurisdiction on the instant appeal is grounded in MCR 7.301, which governs appeals to the Michigan Supreme Court. The Defendant's direct appeal of his conviction was concluded with the Supreme Court's denial of his application for leave to appeal on September 30, 2002. The motion for relief from judgment was filed in the trial court pursuant to MCR 6.500 on August 5, 2003. The trial court's opinion and order denying the motion for relief from judgment was entered on July 20, 2004. The Court of Appeals denied leave on August 16, 2005. The order sought to be reviewed adjudicates all of the claims, rights and liabilities of the parties.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the defendant was deprived of his Due Process right to be sentenced on the basis of accurate information where the sentencing court scored offense variable 3 improperly at 100 points, exposing the defendant incorrectly to a higher sentencing range; and whether the Defendant is entitled to a re-sentencing where the OV-3 issue was never submitted to a jury for determination, and where the prosecution failed to demonstrate this fact beyond a reasonable doubt.

Defendant-Appellant answers "Yes".
Plaintiff-Appellee answers "No".

II. Whether the defendant was deprived of the effective assistance of counsel at trial, at sentence and on appeal?

Defendant-Appellant answers "Yes".
Plaintiff-Appellee answers "No".

CASE BACKGROUND

The Defendant, William Jermichael Carter, was originally charged in Kent County Circuit Court with second degree murder, contrary to MCL 750.317, and driving while license suspended, contrary to MCL 257.904A. On November 9, 1999, following a trial by jury before Judge Soet, Mr. Carter was convicted of second-degree murder and driving without a license. On December 29, 1999, he was sentenced to 24 to 45 years imprisonment for the murder conviction and to time served for driving without a license. Mr. Carter's timely appeal to the Michigan Court of Appeals was denied in a opinion entered on January 11, 2002. His timely application for leave to appeal to the Michigan Supreme Court was denied on September 30, 2002. The defendant's motion for reconsideration of the order denying leave to appeal was denied on December 30, 2002.

The defendant filed a timely motion for relief from judgment on August 5, 2003. That motion was denied in a written opinion and order issued by the Honorable James Robert Redford on July 20, 2004. The Court of Appeals denied leave on August 16, 2005.

STATEMENT OF FACTS

A. Introduction:

During the hours leading up to this fatal car accident, Jermichael Carter was in the company of approximately six young men who traveled throughout the evening of February 26, 1999 in two separate cars: the Chevy Blazer involved in the accident and a Camaro. Travelling in tandem, the men stopped for gas, and later, for alcohol, and then together they visited the apartments of Mr. Carter's girlfriend and sister, drinking and socializing at both locations. All of the witnesses agree that the men switched cars during the hours leading up to the accident.

The central issue in this trial was the identity of the driver at the time of this fatal accident. The evidence as to this issue was highly disputed. First, Jermichael Carter denied driving the Blazer at the time of the accident. Second, none of the physical evidence at the scene pointed to Mr. Carter as the driver. Rather, the physical evidence, including blood evidence and evidence regarding damage to the Blazer and injuries to the car's occupants, pointed to other individuals as being behind the steering wheel at the time of impact. Third, of the many unrelated eyewitnesses at or near the scene, no one was in a position to identify the driver. By the time the first of the unrelated witness arrived at the collision site, all of Mr. Carter's friends had already exited the Blazer. Only Mr. Carter remained in the Blazer. He was injured, barely conscious, and he was not seated in the driver's seat. Fourth, the testimony of the young men accompanying Mr. Carter was hopelessly conflicted on the issue of identity, with one witness from inside the Blazer pointing to Mr. Carter, two witnesses pointing to a person named Dominick Jones, and with still other evidence pointing again to Mr. Blakley.[1] Fifth, the testimony also shows that of the related witnesses offering evidence suggesting that Mr. Carter was the driver at the time of the accident, each had both a motive and the opportunity to conspire with one another to falsely identify Mr. Carter as the driver. Mr. Blakley had an obvious motivation to cast blame away from himself, and Blakley's close friend and cousins had a motive to blame Carter -- to protect a loved one.

With the issue of identity so hotly and genuinely contested, evidence of guilt in this case was by no means overwhelming, and the errors claimed herein cannot be considered harmless.

B. <u>"Unrelated" eyewitness and law enforcement evidence regarding the accident</u>:

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[1] Mr. Carter told police following the accident that Robert Blakley was driving. Of the suspects named by others as being the driver, only the Blakley accusation was supported by physical evidence.

The deceased, Stephanie Farquhar, was driving a Ford Explorer westbound on 29th Street, and had just entered the intersection at Breton Street in Grand Rapids, Michigan when she was struck broadside by a Chevy Blazer traveling northbound on Breton. Witnesses who had observed the Blazer on Breton in the moments before the collision gave wide-ranging estimates of the Blazer's speed prior to the accident of between 40 and 80 miles per hour. [Williams, Trial Tr 11/2/99, Vol III, p 195 (40 MPH); Holwerda, Trial Tr 11/2/99, Vol III, p 184 (50 MPH); Blakley, Trial Tr 11/3/99, Vol IV, p 42 (80 MPH)]. Accident reconstructionists for the defense and the prosecution estimated the Blazer's speed range at "47 to 50" and "50 to 64" MPH respectively. (Bereza, Trial Tr 11/8/99, Vol VI, p 47; McDonald, Trial Tr 11/8/99, Vol VI, p 40). One witness driving on Breton south of the accident scene testified that when the Blazer passed by just before the accident, she thought that the person in the right passenger side was wearing a baseball cap. (Zollner, Trial Tr Vol III, p 19). Other witnesses testified that Mr. Carter was wearing a baseball cap that evening. (Smith, Trial Tr 11/1/99, Vol II, p 136; Woodward, Trial Tr 11/4/99, Vol V, p 58). Some witnesses recalled that as the Blazer went over the railroad tracks a short distance from the collision, one of the Blazer's wheels may have been slightly airborne, and the Blazer appeared to veer slightly to the left before impact with the Explorer. (Williams, Trial Tr 11/2/99, Vol III, p 189; T. VanSpronsen, Trial Tr 11/1/99, pp 37-38).

The witnesses' testimony conflicted as to whether the traffic lights at 29th Street (just south of the accident site) and at 28th Street were "orange" or fully red when the Explorer entered each intersection, however, witnesses directly behind the Ms. Farquahar's vehicle testified that her light was green when the Explorer entered the intersection at 29th and Breton. (Holwerda, Trial Tr 11/2/99, Vol III, p 178; T. VanSpronsen, Trial Tr 11/1/99, Vol II, p 37).

On impact, the deceased vehicle was forced into a northwesterly direction until it came to rest on a berm at the west side of Breton Street. (T. VanSpronsen, Trial Tr 11/1/99, Vol II, pp 38-39). The Blazer struck the deceased's vehicle on the driver's side. The deceased suffered a number of injuries, including a fatal injury to the skull and brain, and a severed artery. According to the medical examiner, the deceased would have died instantly upon impact. (Puri, Trial Tr, Vol VI, pp 59-60).

Within a very short period of time, the unrelated eyewitnesses arrived at the scene of the collision and began approaching the two cars. Witness Jim Sonet approached the Blazer and observed Mr. Carter positioned behind the driver's seat (not in it) "sort of laying on the floor of the Blazer" with his feet between the two front passenger seats. (Sonet, Trial Tr 11/2/99, Vol III, p 169). Witnesses then observed a black male, later identified as Dominick Jones, pulling another black male, later identified as Mr. Carter, out of the car from the passenger side of the Blazer. (VanSpronsen, Trial Tr 11/1/99, Vol II, 42-43; Kaastra, Trial Tr 11/3/99, Vol IV, pp 17-18). A witness approaching from north of the accident observed two groups of young black males. One group of three left the scene on foot proceeding north in the direction of the medical center. The other group of two black males left the scene heading west. (Wilcox, Trial Tr 11/2/99, Vol III, pp 34-38; Tett, Trial Tr 11/9/99, Vol VII, pp 76-77).

C. <u>Testimony of "related" witnesses:</u>

Witnesses explained that in the hours leading up to the accident, Mr. Carter was in the company of the following friends and acquaintances: Carl Palmer, Ernesto McKinney, Gevon Hackett, Dominick Jones, Kamal Smith and Robert Blakley.

1. Incidents earlier in the evening:

The men gathered first at the apartment of Mr. Carter's girlfriend, and later at an apartment complex (named "Traditions") where Mr. Carter's sister lived. (Smith, Trial Tr 11/1/99, Vol II, p 90; McKinney, Trial Tr 11/2/99, p 42; Jones, Trial Tr 11/2/99, Vol III, p 108). There was drinking at both locations, and some of the men were smoking marijuana. (Smith, Trial Tr 11/1/99, Vol II, p 92; McKinney, Trial Tr 11/2/99, Vol III, p 43, 109-110; Jones, Trial Tr 11/2/99, Vol III, pp 109-110; Blakley, Trial Tr 11/3/99, Vol IV, pp 29-30). According to witnesses, en route to the Traditions apartment complex, Mr. Carter was driving the Camaro and Dominick Jones was driving the Blazer. (Smith, Trial Tr 11/1/99, Vol II, p 93; McKinney, Trial Tr 11/2/99, Vol III, pp 44; Jones, Trial Tr 11/2/99, Vol III, pp 110-111; Blakley, Trial Tr 11/3/99, Vol IV, p 30). Mr. Carter apparently "tapped" another vehicle while backing out of a driveway of a liquor store. (Smith, Trial Tr 11/1/99, Vol II, pp 94-95; McKinney, Trial Tr 11/2/99, Vol III, p 45; Jones, Trial Tr 11/2/99, Vol III, p 111). Later, at a gas station, Mr. Carter, still driving the Camaro, "nicked" another Blazer at Oliver's Market, and began speeding when it appeared that the other car was chasing him. (Smith, Trial Tr 11/1/99, Vol II, p 143; Hackett, Trial Tr 11/3/99, Vol IV, pp 104-106; V; Nies, Trial Tr 11/4/99, Vol V, pp 72-75).

Socializing at the "Traditions" apartment of Mr. Carter's sister, the young men became loud and someone broke a chair. The men were asked to leave by a roommate of Mr. Carter's sister, Mildred Brown. (Brown, Trial Tr 11/1/99, Vol II, pp 67-72; Smith, Trial Tr 11/1/99, Vol II, pp 102-103). Ms. Brown testified that she saw the men leave the apartment, but that she could not remember who she saw getting into the driver's seat of the Blazer. She thought she saw the driver's seat of the Blazer go forward prior to anyone getting in. (Brown, Trial Tr 11/1/99, Vol II, pp 73-74, 77, 80). Ernesto McKinney recalled that upon leaving Traditions, Mr. Carter was on the passenger

side of the Blazer, and that Carter pushed forward the passenger seat so that McKinney could enter the back seat. (McKinney, Trial Tr 11/2/99, Vol III, pp 50-51). McKinney thought that when the group left Traditions, Dominick Jones drove the Blazer. (Id., pp 53, 77-78).

2. Positions of defendant and witnesses inside Blazer:

In interviews with police shortly after the incident, Mr. Carter said he was not the driver. (Zobriskie, Trial Tr 11/4/99, Vol V, pp 132-133). According to Mr. Carter, "Puna [Robert Blakley] was driving the truck [the Blazer]". (Tett, Trial Tr 11/8/03, Vol VI, p 66).

The young men travelling with Mr. Carter that evening ("related" witnesses Smith, Blakley, Palmer, McKinney, Hackett, and Jones) gave wildly varying accounts of who was seated where in the Camaro and Blazer when the group left the Traditions apartments shortly before the collision.

Kamal Smith and Robert Blakley both claimed that Mr. Carter drove the Blazer at the time of the accident.[2] However, the testimony of these two men is extremely suspicious when analyzed carefully. First, as discussed below, physical evidence suggests that Blakley was driving the Blazer. Second, Smith and Blakley are cousins and given their family ties, Smith had a motive to protect Blakley. (Smith, Trial Tr 11/1/99, Vol II, pp 88-89). Third, Smith claims he was driving the Camaro, however, many curious facts point to his presence in the Blazer when the accident occurred. (Smith, Trial Tr 11/1/99, Vol II, p 106, 108). During his testimony, Smith slipped and quoted words spoken by people in the Blazer moments before the crash, even though he insists he was not in that

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[2] In the hours and days that followed, Carl Palmer, also Blakley's cousin, initially told police that Dominick Jones drove the Blazer. (Palmer, Trial Tr 11/3/99, Vol IV, pp 140-141). He changed his account, telling police that Carter was the driver. Id. 142-143. Finally, he testified at trial that he believed Jones was the driver, and that he had been threatened by police to identify Carter falsely. See discussion contained infra at Argument §IIB2.

vehicle. Id., 129-130, 132.[3] Smith actually told police that he was in the Blazer. Id. 128. Confronted with this statement at trial, Smith grappled with his own contorted logic: He placed himself (falsely) in the Blazer because he thought he would be in less trouble than if he admitted being in the Camaro. Id. 117. The Camaro had "tapped" two other vehicles. The Blazer was involved in a fatal accident. However, even beyond his own admission to being in the Blazer, Smith slipped again later, telling police that he "felt" the Blazer go into the air before the accident. Id. 130-131. This statement was consistent with the testimony of unrelated witnesses that at least one of the Blazer's tires was airborne before the crash. Consequently, since Smith denied conferring with Robert Blakley as to what happened inside the Blazer (Id. 130-131), it is more likely that Smith was able to describe being airborne in the Blazer because he experienced it first hand.

Blakley's testimony was even more suspicious. He claimed that he was in the passenger seat when the accident occurred. (Blakley, Trial Tr 11/3/99, Vol IV, p 37). However, following the accident, Blakley had an injury to his knee which corresponded to a dent in the dashboard in the driver's area of the car. A physician treating Blakley that night offered an opinion that an injury to Blakley's left knee was consistent with an indentation in the dash under the left side of the driver's steering wheel. (Hoerle, Trial Tr 11/4/99, Vol V, pp 8, 15-16). Moreover, Blakley told the doctor that he thought his knee hit the dash board. (Id. 8). In contrast, even though he was injured and bleeding, Mr. Carter's blood was not found in the area of the driver's seat.[4] Based upon all of the

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[3] In addition, Smith also told Mr. Carter's father "**We** been in an accident". (Woodward, Trial Tr 11/4/99, Vol V, pp 54-55, 67-68).

[4] Carl Palmer's blood was found on the driver's seat. Mr. Carter's blood and baseball cap were found in the back seat. (Kuebler, Trial Tr 11/4/99, Vol V, pp 104-105; Clemens, Trial Tr 11/4/99, Vol V, pp 192-193; Woodward, Trial Tr 11/4/99, Vol V, p 58). Dominick Jones's blood was never (continued...)

physical evidence, accident reconstructionist Tom Bereza offered his expert opinion that Blakley, not Carter, was driving the Blazer. (Bereza, Trial Tr 11/8/99, Vol VI, pp 145-146; 11/9/99, Vol VII, pp 22-28). The prosecution offered no rebuttal expert regarding the issue of the identity of the driver of the Blazer at the moment of impact.

Also suspicious, Blakley slipped twice, putting cousin Kamal Smith in the Blazer, not the Camaro, upon impact. (Blakley, Trial Tr 11/3/99, Vol IV, pp 45, 66-67). Even more significant, Blakley slipped two more times, on two separate days of trial testimony, placing himself in the driver's seat. Id. 37, 75-76.

Cousins Blakley and Smith had a clear opportunity to construct a story identifying Carter falsely as the driver. Blakley left the scene of the accident immediately. (Blakley, Trial Tr 11/3/99, Vol IV, p 48-49; Palmer, Trial Tr 11/3/99, IV, p 145). When Blakley left the scene, he believed that Mr. Carter was dead. (Blakley, Trial Tr 11/3/99, Vol IV, p 47). The others also described Mr. Carter as appearing asleep, unconscious, or dead when Blakley left the scene. (Smith, Trial Tr 11/1/99, Vol II, p 114; McKinney, Trial Tr 11/2/99, Vol III, pp 67-69). Blakley, Carl Palmer and Ernesto McKinney fled north on foot to a nearby medical center because they were either injured or bleeding or both. (McKinney, Trial Tr 11/2/99, Vol III, pp 58, 68-69; Smith, Trial Tr 11/1/99, Vol II, p 113). However, Kamal Smith collected the three men at the medical center before anyone received

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(...continued)
drawn. (Tett, Trial Tr 11/8/99, Vol VI, 98).

treatment. (Id. 115). Blakley, Palmer, Smith and McKinney left the medical center in the Camaro, and McKinney was dropped off a short distance from the medical center. (Id. 112-116).[5]

From the medical center onward, Smith and Blakley were together consistently for the next several hours, first at a house on Benjamin (where they made a series of frantic calls), and later at the Bates street apartment where Mr. Carter ultimately was found. Id. 116-118.

During these calls, Blakley and Smith began a series of fabrications to cover up their involvement in the accident, including efforts to disassociate themselves from the Blazer, which Blakley owned. (Blakley, Trial Tr 11/3/99, Vol IV, p 27). Blakley called his mother and he instructed her to report (falsely) that the Blazer had been stolen by strangers. (Goree, Trial Tr 11/8/99, Vol VI, p 114-115; Smith, Trial Tr 11/1/99, Vol II, p 116).

Blakley and Smith's testimony was curious in other respects. No other witness, related or unrelated, claimed that Mr. Carter's body was in the driver's seat following the crash. According only to Blakley, after the accident, Mr. Carter was sitting in the driver's seat, with his legs fully under the steering wheel, his upper body laying over the console. (Blakley, Trial Tr 11/3/99, Vol IV, pp 45-46). Smith, less emphatic, described Carter as being in the "driver's side". (Smith, Trial Tr 11/1/99, Vol II, p 112). Contrast Jones, Trial Tr 11/2/03, Vol III (Carter's body in the back seat, legs on console, head behind the passenger seat); McKinney, Trial Tr 11/2/99, Vol III, pp 74, 65 (Carter's "butt" on console, feet on the passenger floor, head on the driver's seat leaned over).

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[5] Meanwhile, the "second group" described by the unrelated witnesses (ie., the group left behind by Blakley), not coincidentally, were the two men most often identified by Blakley's group as the driver(s) of the Blazer: Carter, left for dead, and Dominick Jones, the only person who stayed to render assistance. (Id. 112; Tett, Trial Tr 11/9/99, Vol VII, pp 76-77).

The sole unrelated witness to view Carter's body immediately following the accident, Jim Sonet, testified that Carter was positioned behind the driver's seat (not in it) "sort of laying on the floor of the Blazer" with his feet between the two front passenger seats. (Sonet, Trial Tr 11/2/99, Vol III, p 169). Given Carter's unconscious, "dead"-like state described by all the witnesses, it is highly unlikely that Carter moved his own body from the position described by Blakley to the position described by Sonet.

Moreover, Blakley's characterization of Carter's position in the car and Carter's driving speed upon impact were (a) the most incriminating for Carter, and (b) the most inconsistent when viewed in contrast to the accounts of other witnesses. Contrast Blakley, Trial Tr 11/3/99, Vol IV, p 42 (80 MPH) with McKinney, Trial Tr 11/2/99, Vol III, p 54 (55-65 MPH) and the experts, Bereza, Trial Tr, Vol VI, p 47 (47-50 MPH) and McDonald, Trial Tr Vol VI, p 40 (55-65 MPH).

Finally, when this incident occurred, Robert Blakley was on bond for both drunk driving and leaving the scene of a property damage accident -- two crimes which, coincidentally, were necessarily committed by the driver of the Blazer on the night of the accident.

SUMMARY OF ARGUMENT

Defendant-Appellant was deprived of his due process right to be sentenced on the basis of accurate information where the sentencing court scored Offense Variable 3 improperly at 100 points. During Defendant-Appellant's appeal pursuant to MCR 6.500, the Michigan Court of Appeals ignored a published opinion from the Court of Appeals holding that the proper scoring of this variable in a homicide case should be zero.

Defendant-Appellant was deprived of the effective assistance of counsel at the time of sentencing when his counsel failed to object to the improper scoring of OV 3. The error deprived Defendant-Appellant of his substantial rights because it placed him in a higher guideline range. Defendant-Appellant was also deprived of the effective assistance at trial and on appeal, where counsel failed to understand, object to, and/or preserve various errors which deprived Defendant-Appellant of a fair trial.

ARGUMENTS

I.

THE DEFENDANT WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO BE SENTENCED ON THE BASIS OF ACCURATE INFORMATION WHERE THE SENTENCING COURT SCORED OFFENSE VARIABLE 3 IMPROPERLY AT 100 POINTS, EXPOSING THE DEFENDANT INCORRECTLY TO A HIGHER SENTENCE RANGE; AND THE DEFENDANT IS ENTITLED TO A RE-SENTENCING WHERE THE OV-3 ISSUE WAS NEVER SUBMITTED TO A JURY FOR DETERMINATION, AND WHERE THE PROSECUTION FAILED TO DEMONSTRATE THAT FACT BEYOND A REASONABLE DOUBT.

Standard of review: Interpretation of the sentence guidelines' language is a matter of law and is reviewed de novo. People v Leverse, 243 Mich App 337, 349 (2000).

The defendant has a Due Process right to be sentenced on the basis of accurate information. Townsend v Burke, 334 US 736, 68 SCt 1252, 92 LEd 1690 (1948); People v Fleming, 142 Mich App 119, 125 (1985). In this case, Mr. Carter was attributed 100 points under offense variable #3 under the 1999 Michigan Sentencing Guidelines applicable at the time of his sentencing. MCL 769.34. The defendant did not challenge this aspect of the scoring of his guidelines, and consequently, the issue is reviewed for clear error that affected the defendant's substantial rights. MCR 6.429(C); People v Carines, 460 Mich 750, 763 (1999)(where the error seriously affected the fairness, integrity or public reputation of the judicial proceedings). See also discussion infra regarding counsel's ineffective assistance.

Under OV#3, 100 points are applicable for non-homicide offenses, and zero points are applicable for homicides. The Michigan Court of Appeals has held that a vehicular homicide is considered a homicide for purposes of the application of OV#3, and that zero points should be scored

for such offenses. People v Brown, 265 Mich App 60 (2005); People v Crossley, 2002 WL 31929332, **6-7 (Mich App)(unpublished and appended). While the Crossley and Brown cases had not yet been decided at the time of Mr. Carter's sentence, their holdings are consistent with the common sense definitions of "homicide" and "vehicular homicide". Black's Law Dictionary (7th ed. 2000, abridged) pp 589-90, defines "homicide" as "the killing of one person by another", and "vehicular homicide" as "the killing of another person by one's unlawful or negligent operation of a motor vehicle."

The Brown case was a published Court of Appeals decision that was binding on the panel which decided Mr. Carter's 6.500 case in the Court of Appeals. The case was brougth to the Court of Appeal's attention timely in a Supplemental Authority filed under MCR 7.212(F), and yet the Court chose to disregard it.

Had Mr. Carter's guidelines been scored correctly by the trial court or by the Court of Appeals, OV#3 would have been scored at zero, his point total would have been reduced from 126 to 26 points, and his overall offense level would have been reduced from level III to Level I. Because Mr. Carter's prior record placed him at a level D, his sentence guideline range would have been reduced from a range of 270 to 450 months to a range of 180 to 300 months. As in the Crossley case, the error should result in a reversal and a remand for resentencing notwithstanding the failure to object because the claim is one that affects the defendant's substantial rights, and the claim is tied to claim of ineffective assistance of counsel. Id. *7, and see discussion infra at Argument §II.

In the 6.500 proceedings below, the prosecutor argued that the court should deny relief simply because the actual sentence imposed on this defendant falls within both the correct and incorrect sentence guideline ranges. The trial court accepted this reasoning during the 6.500

proceedings. However, the prosecution offered no legal support whatsoever for such a bright-line test. Moreover, this argument flies in the face of both state and federal law. For example, in People v Bradford, 2003 WL 21350235, **2-3 (Mich App), unpublished and appended, the defendant's initial sentence of 144 months fell within the corrected guideline range. However, contrary to the prosecutor's argument here, resentencing was ordered based upon the following analysis.

> Here, the corresponding error did change the applicable guidelines' range -- defendant's OV level dropped from V to IV, bringing a reduction in the corresponding sentence range. "A defendant is entitled to have the sentencing guidelines' range correctly calculated so that a court may determine an appropriate sentence in light of that range." People v Hannan, 200 Mich App 123, 127 (1993). Instead of falling near the middle of the guidelines' range as it originally did, the imposed sentenced now falls at the very top of the recalculated range. Accordingly, we vacate the sentence for the conviction of first-degree home invasion and remand for resentencing.

Bradford, *3.

Moreover, a recent opinion from the Michigan Supreme Court, People v Kimble, 470 Mich 305 (2004), indicates that the fact of an actual sentence falling within both the correct and the incorrect sentence guideline ranges is not dispositive. In Kimble, the Court was addressing a sentence that was outside the corrected sentence range. However, the Court noted as follows with respect to an actual sentence which falls within both ranges.

> [I]f the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for re-sentencing, or in a motion to remand.

Kimble, 470 Mich at 310.

In addition, the Court in Kimble indicated that a request for resentencing can be made within a motion pursuant to MCR 6.508(D)(3), Id., -- precisely what Mr. Carter does here. Mr. Carter meets all of the other criterion under Kimble, as demonstrated previously, because there was a scoring error here and because inaccurate information was relied upon.

A similar approach has been taken by federal courts in analogous cases. In United States v Gill, 348 F3d 147, 155 (6th Cir 2003), the Court ordered a resentencing where the error affected the guideline range, and where the initial sentence fell within both ranges.

> [T]he government insists that the district court's error was harmless because the sentence of 21 months is admittedly within both of the competing guideline ranges in this case. Harmless error is not an inevitable conclusion under these circumstances. Rather, in determining whether a remand is required, a reviewing court "... must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors."

Gill, 348 F3d at 155, quoting from Williams v United States, 503 US 193, 203; 112 SCt 1112; 117 LEd2d 341 (1992).

Significantly in Gill, the Court observed that "[w]hen the [sentencing] court sentences a defendant to the low end of the guideline range ... the [reviewing] court can reasonably infer that the defendant might have received a lower sentence if the guideline range itself had been lower." See also Bradford, *3. Here, Mr. Carter's sentence, 288 months, was at the low end of the incorrect (higher) guideline range, 270 months to 450 months, and it is at the high end of the correct (lower) guideline range, 180 months to 300 months. Consequently, the holdings of the Bradford and Gill cases apply, the error was not harmless, and resentencing is required.

The Williams case from the United States Supreme Court is also instructive on the issue of the respective burdens of proof of the parties.

> ... [A] court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors."
>
> We conclude that the party challenging the sentence on appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of showing that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals has decided that the district court misapplied the [g]uidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed.

Williams, 503 US at 203.

While the Williams case involved an interpretation of the burdens of proof for purposes of the federal sentencing guidelines, its analysis applies with equal force here, and is far more sensible and fair than the test proposed by the prosecution in this case -- i.e., barring resentencing to any defendant whose sentence falls within both guidelines.

The lower court during the 6.500 proceedings also found that the defendant had failed to show "good cause" for his failure to raise the issue on appeal. On the contrary, Mr. Carter demonstrates good cause through his showing that his counsel was ineffective at sentencing and on appeal. See Motion for Relief from Judgment at p 2, paragraph 7B, and Brief in Support at pp 15, 42-45; Reply Brief at pp 4-8; and Argument II, infra.

In addition, on rehearing during the 6.500 proceedings, the trial court assumed that an error occurred with respect to the guidelines (implicitly accepting the defendant's ineffective assistance claim), however, the court concluded that its sentencing would be no different than that which was imposed originally. The court failed to order a hearing of any kind. However, this reasoning ignores

the defendant's independent right to an updated presentence report and his right to allocute at his re-sentencing once the reviewing court determines that an error has occurred. Secondly, this rationale ignores the fact that at a re-sentencing, the court would be obliged to consider facts which have taken place since the original sentence, including the defendant's institutional adjustment or rehabilitation in the intervening years since the original sentencing, or other intervening changes in the sentencing case law that might affect the sentence. See People v Moore, 91 Mich App 319 (1979) (right to allocute an updated presentence report, consideration of intervening prison conduct): People v Philips, 127 Mich App 28 (1978) (intervening prison record); People v Levandoski, 237 Mich App 612, 627 (2000) (intervening conduct, change in re-sentencing laws). As to the latter factor, in the aftermath of defendant's original sentencing, the United States Supreme Court issued its decision in Blakely v Washington, 542 US 296, 124 SCt 2531 (2004). The defendant maintains that under Blakely, the court erred by scoring OV-3 for the additional reason that the defendant's sentence could not be escalated based upon a variable which was not decided by the jury beyond a reasonable doubt. In this case, OV-3 should not have been scored by anyone -- neither the jury nor the judge.

In addition, the trial court was required to sentence the defendant in accordance with the Sentence Guidelines in effect at the time of the offense, and to articulate its reasons for imposing the sentence given. MCR 6.425(D)(2)(d) and (e). No reason was given by the Court for its scoring of OV#3. Moreover, the SIR was not signed by the Court as required by Court Rule. MCR 6.425(D)(1). The defendant is entitled to a resentencing for all of these reasons.

Accordingly, Mr. Carter respectfully requests that this Court vacate his sentence and allow a resentencing. See e.g. People v Carpentier, 446 Mich 19, 45, 48-49 (1994) (exacerbation of defendant's sentence is a jurisdictional defect that requires resentencing).

II.

THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AT SENTENCE AND ON APPEAL.

Standard of review: A reviewing court must reverse a defendant's conviction based upon ineffective assistance of counsel where the defendant establishes that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the jury would not have convicted the defendant. People v Pickens, 446 Mich 298; 521 NW2d 797 (1994); People v Snider, 239 Mich App 393, 423-424 (2000).

Both the Michigan and the United States Constitutions provide an accused with the right to the effective assistance of counsel. Mich Const Art 1, §20; US Const Amend VI. Strickland v Washington, 466 US 668; 104 SCt 2052, 80 LEd2d (1984); People v Pickens, 446 Mich 298 (1994). Ineffective assistance can be established by a failure or omission that "deprives the defendant of a substantial defense" and/or where counsel's errors "have undermined the reliability and confidence in the result." Strickland v Washington, 466 US 668 (1984); McQueen v Scroggy, 90 F3d 1302, 1311 (6th Cir 1996); Beasley v United States, 491 F2d 687, 696 (6th Cir 1974).

The following are among the issues raised on Defendant's direct appeal:

> Argument I: The defendant was deprived of his Sixth Amendment right to an impartial jury when the Court mishandled allegations made by two jurors who claimed someone had followed them to their vehicles: where the Court failed to conduct an individual voir dire of the tainted jurors, where the court suggested to the entire jury panel that the suspects may have been members of the defendant's family, and where earlier in the trial, the prosecutor had blurted out that the defendant had threatened witnesses without any record support whatsoever.

Argument II: The defendant was deprived of a fair trial due to prosecutorial misconduct where the prosecution team threatened Witness Carl Palmer improperly, assuring Palmer that he would do "years" on a parole violation or some other charge if he failed to change his story and identify the defendant as the driver of the Blazer, and where later, during trial, the prosecutor introduced evidence (a tape recording) which resulted directly from the earlier, improper threat to Palmer.

Argument III: The prosecutor infringed upon the defendant's right to counsel when he introduced evidence that the defendant had consulted with counsel before making a decision not to appear in a pretrial line-up.

During his direct appeal, the defendant maintained that the foregoing amounted to plain errors warranting reversal. Each of these claims were rejected on direct appeal. See Court of Appeals opinion, appended. As an alternative ground, Defendant maintains herein that counsel was ineffective because he failed to preserve these issues properly at trial, an omission which affected the viability of these claims on appeal. In addition, for the reasons stated at Argument I, Defendant was sentenced improperly when he was scored 100 points incorrectly under the homicide sentence guidelines. Defendant maintains that both his trial and appellate counsel were ineffective in failing to preserve this latter sentencing issue properly.

These arguments may properly be raised for the first time on a collateral appeal of the defendant's conviction and sentence. Massaro v United States, 123 SCt 1690 (April 23, 2003).

A. State and federal law regarding counsel's failure to object:

Trial counsel's failure to object to the improper admission of evidence can result in ineffective assistance of counsel under Strickland where the omissions "have undermined the reliability of and confidence in the result". McQueen v Scroggy, 99 F3d 1302, 1311 (6th Cir 1996). People v Fenner, 136 Mich App 45 (1984) (failure to object to hearsay). Where the failure to object

allows for the introduction of evidence as to the ultimate issue at trial, counsel's deficient performance prejudices the defense such that the defendant is deprived of a "fair trial, a trial whose result is reliable". Strickland, 466 US at 687; Fenner, supra (hearsay evidence regarding the defendant's commission of criminal sexual conduct).

Defendant maintained on direct appeal that Arguments I, II and III listed above were adequate to warrant reversal either because defense counsel made some form of an objection, or because plain error occurred in each instance. Alternatively, in the event this Court finds that counsel's objections, if any, were inadequate to preserve these errors, then Defendant maintains that ineffective assistance of counsel deprived him of a fair trial.

B. Trial counsel's omissions constituted ineffective assistance:

1. Failure to preserve juror taint challenge at trial:

During the trial of this matter, two jurors made an accusation that someone from the defendant's "side" of the courtroom had followed them all the way to the parking lot on two successive days in a suspicious manner that the jurors described as "blatant" and "alarm[ing]". Defendant contends that the Court exacerbated this situation (a) by questioning these two jurors in the presence of the rest of the panel thereby contaminating all of the jury, (b) by suggesting that the culprits who followed the jurors were members of Mr. Carter's family, and (c) by alarming jurors further in suggesting that they needed an escort by the Sheriff on their way to and from lunch. This error occurred in the context of a trial that was already so highly charged due to extraordinary media attention that the Court had expressed doubt on the record that the parties would even be able to seat an impartial jury in Kent County. Finally, jurors were also tainted by the prosecutor's inexplicable

"blurt out" that the defendant had threatened "various" trial witnesses -- an incredibly prejudicial comment that had no basis in the trial record.

* * *

The defendant's trial received a tremendous amount of publicity, in part because the victim in this case was an innocent young woman who had just graduated from a local Grand Rapids high school. The defendant's bad driving record was widely reported by the media, even after the Court ruled such evidence to be inadmissible. Defense counsel had filed a motion for change of venue and the Court ruled they would attempt to pick a jury in Kent County, while expressing doubts as to whether this would be possible because of the extraordinary amount of publicity. (Trial Tr 10/28/99, Vol I, pp 11-12; Order Re: Change of Venue, 7/16/99). A jury was eventually seated in Kent County and the trial proceeded.

At the end of the fourth day of trial, the Court announced the following to the entire jury.

> THE COURT: Ladies and Gentlemen, I've had reported to me by my clerk that some jurors have indicated that they were approached by persons they've seen in this courtroom. It wasn't reported to me that anybody spoke to any juror, but that one or two jurors have indicated that someone followed them to their car, and that these were persons whom they had seen in the courtroom.
>
> Are there any problems I should know about? I want to make sure that it's very clear that we want to be sure that we have a fair and impartial trial here.
>
> Anybody who feels that anything has happened which would impair their ability to be fair and impartial?
>
> It's possible that some of these persons you saw could have been on their way to their car or something else, I don't know, and **they might be friends or relatives of Mr. Carter's**, but there's no indication that Mr. Carter is the person who is causing any of this, if this is happening.

Any problems that you want to report to me?

JUROR NO. 1: Yesterday on the way to my car, I'm not saying that like anybody was following me or anything, but when I was going out the parking ramp, someone sitting on that side of the courtroom that I recognized just happened to be behind me, which could have been purely coincidence, I wasn't really concerned about it.

THE COURT: Okay.

JUROR NO. 1: But today when I walked in after lunch, **another juror actually noticed that same lady who followed me was pointing at me, whispering to someone else about me.** I don't know if she could have commented something I was wearing or my hair or something, but -

THE COURT: Oh, well, you look very nice today.

JUROR NO. 1: Well, thanks, but **it kind of, you know, alarmed me a little bit.**

THE COURT: Anybody else have any problems?

JUROR NO. 3: (Indicating)

THE COURT: Yes?

JUROR NO. 3: Yesterday leaving the courthouse, there was two people standing outside. **They followed me into the parking garage** and approximately stood about 20 feet away and watched me get into my car and -

THE COURT: Okay. Did they follow your car?

JUROR NO. 3: Not that I noticed. But I mean **it was pretty blatant like they were following me.**

THE COURT: All right. Either of you have any feelings that you couldn't be fair and impartial to Mr. Carter because of whatever happened?

JUROR NO. 3: (Shaking head)

JUROR NO. 1: No, not at all.

THE COURT: You, sir?

JUROR NO. 3: No.

THE COURT: Okay. Anybody else have any complaints?

THE JURORS: (No response)

THE COURT: All right, you should bear in mind that strange things occasionally happen. They may have nothing to do with Mr. Carter. He's not doing these things, from the descriptions. What I will do, however, is first I'm going to enforce a rule that people will not be coming in and out of the courtroom except at break time. We don't want people running in and out of her all the time, we don't want people disrupting the trial. Secondly, **I'll have a deputy available at lunchtime to take you wherever you want to go.** He is not going to eat with you in the restaurant, but **if you need somebody to walk you out to your car, across the street, or whatever, or if you want somebody to go with you to your car in the evenings, we'll have deputies available to do that.** If you want anything else or you feel in any other way you need assistance of any other kind, you tell my clerk, and she will tell me, and I will do something about it.

(Court, Trial Tr 10/28/99, Vol IV, pp 166-169 (emphasis added).

The Court's handling of these incidents raises numerous problems. First, all of the jurors were addressed in a group, despite the fact that the Court had taken great care to question jurors individually during voir dire due to the extraordinary risk of taint (and spillover taint) created by the prejudicial pretrial publicity.[6] Second, the Court did not offer the parties an opportunity to question jurors about the incidents. Third, the Court offered broadly worded questions to jurors -- as to whether they thought they could still be fair -- to ferret out any prejudice towards the defendant that

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[6] Individual voir dire allows the trial court to ask probing questions of jurors while "insulat[ing] the jurors from one another's prejudicial comments." Cummings v Dugger, 862 F2d 1504, 1508 (11th Cir 1989).

may have resulted from the incidents. Fourth, the Court offered little in the way of an effective curative instruction after questioning the two jurors.

The jurors' own comments regarding what had occurred and how they felt about it demonstrated the degree to which they were affected by the incident. Juror Number One had chalked up the encounter to pure coincidence until "another juror actually noticed that same lady who followed me was pointing at me, whispering to someone else about me . . . it kind of alarmed me a little bit ..." (Trial Tr 11/3/99, Vol IV, p 168). Juror Number Three indicated that two people followed him to the parking garage, the people stood around twenty feet away, and the people watched Juror Number Three get in his vehicle. The juror was asked by the court if the people proceeded to follow his car. Juror Number Three responded:

> Not that I noticed. But I mean it was pretty blatant like they were following me.

(Trial Tr 11/3/99, Vol IV, pp 168).

The Court's comments thereafter, while no doubt well-intentioned, only made matters worse. By suggesting that the unknown people following Jurors One and Three might be members of the defendant's family or friends of the defendant, and by offering jurors a Sheriff's escort to lunch or to the parking lot, the trial court underscored (a) that jurors may actually be at risk, and (b) the suspects are associated to the defendant. The Court's comments were significant because neither juror had stated that they believed the persons following them were members of the defendant's family.

The prosecutor exacerbated the foregoing error when, inexplicably, he blurted out the following in front of the jury:

> THE PROSECUTOR: Aren't [the defendant's] threats to the various witnesses relevant? You don't have to answer it now, but give it some thought.
>
> THE COURT: I don't think so.

(Court/Counsel, Trial Tr 11/2/99, Vol III, p 136). No curative of any kind followed this blurt-out by the prosecutor. When all of the foregoing is taken into account, it is no wonder that jurors became personally (albeit unreasonably) afraid for their own well-being during this trial.

The Sixth Circuit Court of Appeals has recently addressed the procedures to be followed where jurors may be tainted by virtue of improper contact which occurs outside the courtroom. In United States v Paul Corrado, 227 F3d 528 (6th Cir 2000), the Court was faced with allegations that an individual (not the defendants in the case) had attempted to tamper with the jury. The incident occurred shortly before closing arguments. The defendants were being tried on racketeering charges. An individual allegedly approached the defendant, Paul Corrado, and said he had a friend on the jury who could help Corrado. Defendant Corrado reported the incident to the government. A discussion was held with the Court and the attorneys concerning the various methods that could be employed to address the problem. Defense counsel requested an independent examination of the jurors, and attorney-conducted voir dire regarding the incident. Instead, the trial court opted for three general questions posed to the jury panel as a whole. Id. 534.

> "Has anyone outside the jury tried to influence you in any way about this case. Has anyone on the jury tried to influence what you will do in any, in your deliberations in any way[,] is there any reason you believe that you could not continue to serve as a fair and impartial juror on this case." If the answer to any of those questions was "yes," an individual juror would be instructed to send the judge a note. Any juror who responded affirmatively would then called in individually to answer questions from the district court and attorneys.

Corrado, 227 F2d at 534. The Sixth Circuit held that the court's approach was an inadequate response to the incident. The Court had held in earlier cases that when there ". . .is a serious allegation of extraneous influences, the court must investigate sufficiently to assure itself that constitutional rights of the criminal defendant have not been violated." United States v Rigsby, 45 F2d 120, 124-125 (6th Cir 1995). In United States v Herndon, 156 F2d 629, 635 (6th Cir 1948), the Court held that where a colorable claim of extraneous influence has been raised, a hearing must be held. In United States v Shackelford, 777 F2d 1141, 1145 (6th Cir 1985), the court held that a trial court's refusal to hold a hearing may constitute an abuse of discretion when the alleged jury misconduct involves extrinsic influences. In Corrado, the Court chastised the trial court as follows:

> The investigation by the district court in this case fell far short of the procedures set forth in [Remmer v United States, 347 US 227, 74 SCt 450, 98 LEd 654 (1954)]. Instead, the district court directed three broadly-worded questions to the jury as a group and instructed any jurors who had affirmative responses to bring themselves to the court's attention by writing a note. A juror who had even the slightest hesitation about coming forward could simply do nothing. Indeed, in retrospect, it is now clear that the juror who had in fact been contacted did just that. We therefore conclude that the district court abused its discretion by failing to conduct an adequate evidentiary hearing into the allegations of extraneous influences on the jury pursuant to the holding in Remmer.

Corrado, 227 F3d at 536.

In this case, as in Corrado, the Court's broadly-worded question to jurors as to whether they could be fair and impartial was wholly inadequate. As noted above, the inquiry should not have been made to the jury as a group. Since Juror Number Three had indicated that these persons came from "that side" of the courtroom, the Court should have done follow-up questioning as to who the juror was referencing. Jurors One and Three should have been asked whether they had any doubt as to

whether this incident was [not] associated with the defendant. The jurors should have been asked whether they had discussions with any other jurors about what had occurred and as to how they or any of the other jurors felt about the incident.

Defendant maintains that even based upon the current record, these jurors were clearly affected. One juror verbalized being "alarmed" and the other described the "following" as "blatant", thereby ruling out the possibility that it could just have been a "coincidence" or just a "strange occurrence", as suggested by this Court. Juror Number One stated that she had even expressed her concern to another juror, with the other juror reinforcing her fears by telling her she thought the "same" person had been pointing Juror Number One out and referring to Juror Number One. Moreover, the record is fairly clear that the juror(s) associated the incidents with the defendant. The juror obviously was pointing to the defendant's side of the courtroom by using the phrase "that side" because jurors are routinely seated right next to the prosecutor. The Court's reference to the defendant's family and friends would have left little doubt in the remaining jurors' minds which team was responsible.

Moreover, the jurors' refusal or inability to acknowledge that the incident affected their impartiality should not control here. Courts have historically been skeptical of a juror's self assessment that he or she can be fair and impartial. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." Irvin v Dowd, 366 US 717, 728; 81 SCt 1639; 6 LEd2d 751 (1961). This would especially be true in a highly publicized trial which had already proceeded through its fourth day.

The Michigan Court of Appeals rejected this challenge, stating as follows:

> Defendant did not object to the procedure the trial court used in investigating the concerns, and he has therefore forfeited the issue. To obtain relief on a forfeited issue, a defendant "must show a plain error that affected substantial rights," and reversal is appropriate "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."

People v Carter, *1, quoting from People v Carines, 460 Mich 750, 774 (1999). Defendant maintains that this is precisely the type of error which "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." In the companion appeal of United States v Anthony Corrado, 2000 WL 12909343 [6th Cir (Mich)], the Sixth Circuit addressed the defendant's unpreserved claim of juror taint. In Anthony Corrado's case, as here, the trial attorney had not preserved the issue by requesting a Remmer hearing. The Court held that under the circumstances of that case, it was incumbent upon the trial court to conduct a hearing sua sponte.

> [Although] the issue has not been preserved in this case, . . . we nonetheless retain discretion to address trial errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings."

Anthony Corrado, *4-5, quoting from United States v Atkinson, 297 US 157, 160, 80 LEd 555, 56 S Ct 391 (1936). The Court in Anthony Corrado case remanded the case for a Remmer hearing notwithstanding the defendant's failure to preserve the issue properly. Likewise in Michigan, the failure to object to trial errors have been excused in related contexts where the error "has resulted in a denial of a fair trial, particularly in a situation where defense counsel would have to object to the trial judge's own questions in front of the jury. People v Smith, 64 Mich App 263, 266 (1975). "`[W]e do not think that a lawyer should be put in the position of challenging such conduct and

thereby possibly incurring the judge's displeasure.'" Id., quoting from People v Roby, 38 Mich App 387, 389 (1972). The same result should obtain in this case.

Alternatively, in the event this Court finds that trial counsel failed to take adequate steps to object, to request individual voir dire, to ask for attorney-conducted voir dire, to request an effective curative and/or move for mistrial based upon the juror taint error -- then Defendant maintains that ineffective assistance of counsel deprived him of a fair trial. The juror taint issue should have resulted in a mistrial because it is precisely the type of error that results in a "miscarriage of justice". United States v Paul Corrado, 227 F3d 528, 534-538 (6th Cir 2000); United States v Anthony Corrado, 2000 WL 12909343, **4-5 [6th Cir (Mich)], The fact that the underlying error has been held to warrant reversal in other cases itself demonstrates that counsel's omissions here constituted a "serious mistake" but for which the defendant would have had a reasonable chance of acquittal, reversal or retrial. People v Garcia, 398 Mich 250 (1976); People v Degraffenreid, 19 Mich App 702 (1969).

2. Failure to object to the introduction of evidence (tape recording) resulting from threat to Witness Carl Palmer:

The prosecution alleged in this case that there were four people in the Blazer when it struck the deceased, killing her instantly. Witness Carl Palmer's testimony was important to the prosecution because he was one of the four people in the Blazer at the time of impact. However, Palmer testified that it was Dominick Jones, not the defendant, driving the Blazer. During trial, the following exchange occurred between the prosecutor and the witness:

BY THE PROSECUTOR:
Q Does anybody else get in the back?
A Not yet. Eventually.
Q Well, who was it?

A Ernesto.
Q Who gets in the front passenger?
A After the tangle over? Robert.
Q Who?
A Robert.
Q Who gets behind the driver's wheel?
A Dominick.
Q No, no, I mean at Traditions, **who gets behind the driver's wheel?**
A Dominick.
Q Bye.
A What?
Q Have you made two statements to the police regarding these events?
A Yes, I have.
Q The first one to Officer Edgcombe?
A Yep.
Q And the second one to Officer Tett, who is seated here?
A Right.

DEFENSE COUNSEL: Your Honor, I would object. [The prosecutor's] reactions, they're not - they're not evidence. They're totally inappropriate. They're done apparently for the benefit of the jury to put on a show. He's testifying. Just because he doesn't like the answer, doesn't mean we need these remarks.

THE PROSECUTOR: Well, you're laughing, good-bye, ha.

A Like Monday, when this guy came to see me, man, he was very unprofessional, threw the tape recorder in my lap, man, I don't really want to be here.

THE COURT: Mr. Palmer?

A Yeah.

THE COURT: Excuse me. Stop talking. Refrain from making personal remarks and opinions, Mr. Schieber.

THE PROSECUTOR: Yes, sir.

(Palmer, Trial Tr 11/3/99, Vol IV, pp 140-142).

Undaunted, Carl Palmer continued to name Dominick Jones as the driver in his trial testimony. In reply, the prosecutor played a tape which was made during a police interview after Palmer was threatened by the prosecution team. In the tape recording, Palmer named the defendant as being the driver of the Blazer, not Dominick Jones. At trial, Mr. Palmer responded to the playing of the tape by insisting that the prosecutor play his original taped statement where he had named Dominick Jones as the driver (as in his trial testimony).

The prosecutor then asked Palmer if he had lied to Officer Tett when Palmer named the defendant as the driver. Mr. Palmer responded in the following colloquy.

BY THE PROSECUTOR:

Q You lied to Officer Tett?

A Yes. I did.

Q For what possible benefit?

A What possible benefit? Because he came and threatened to put big numbers over my head, telling that I'm looking at such and such amount of time.

Q For what?

A Or what? For what?

Q Yes, why, why would you be looking at such and such as amount of time?

A You ask him why he came and told me that. I made my first statement. He come to me telling me I'm lying, prove I was lying. So he come over to me with these big numbers, scared me. I would have told him anything. Now I'm under oath, and I am saying what I remember. So -

Q What scared you, were you facing some charge that -

A That's what he told me, I was looking at time.

Q For what?

A Ask him.

Q I'm asking you, you must have been curious.[7]

A He didn't tell me. He told me, man, I'm looking at such and such an amount of time, ten to 15 for that and that. I don't know, man, I just told him that to get him out of my face.

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[7] Carl Palmer's blood was found in the driver's seat of the Blazer. (Kuebler, Trial Tr 11/4/99, Vol V, pp 104-105).

Q Ten or 15 for what or what?
A Man, I told you I don't know, I told you to get him out of my face, man.

(Palmer, Trial Tr 11/4/99, Vol IV, pp 146-148).

On cross-examination, defense counsel asked Palmer what he understood these threats to mean, and what he understood as to the relationship between his status as a parolee and the prosecutor's expectation about the content of his trial testimony:

BY DEFENSE COUNSEL:
Q Okay. Are you currently on parole?
A Yes.
Q Okay, now, you mentioned earlier that you were held on a material witness warrant, correct?
A Right.
Q You're also being held on a parole detainer?
A Right.
Q Okay. Have you been told when your parole violation matter will be cleared up?
A It's - they told me just to get some of this stuff cleared off of my head for right now.
Q Did they say what stuff that was?
A Actually, this case right here, is what they told me.
Q Okay. So it was your understanding that until you testified in this matter, you wouldn't know what was going to happen with your parole?
A I don't - I ain't most likely going to leave.
Q But I guess my question is, is it your understanding that you're not going to find out what happens until after you've testified here today?
A Right.

...

MR. PALMER: You know what I'm saying? So he started putting big numbers over my head.

DEFENSE COUNSEL: And what is big numbers, what do you mean, what is a big number?
A Ten years or better.
Q Ten years of what?

A Ten years in prison.
Q Okay. And a minute ago, when you answered, you said Dominick was driving, did you hear Mr. Schieber say good-bye?
A Yes, I did.
Q And what did that mean to you when he said that?
A Self-explanatory. I'm gone.
Q What do you mean you're gone?
A I'm either going to get some time, or, I don't know, I took it like I'm going back to prison, that's how I took it.
Q Because why?
A I'm gone, you mean -
Q Because why?
A Because why?
Q Yeah, why would you be gone?
A Why would I be gone?
Q Yeah.
A Because I didn't agree to what he wanted me to say.

Id. 150-151, 153-155 (emphasis added).

A prosecutor may impeach a witness in court, but he may not intimidate him. People v Pena, 383 Mich 402 (1970). In Pena, the prosecutor sent letters to witnesses who were expected to testify favorably to the defendant. The letters warned witnesses of the consequences of perjury. In reversing the defendant's conviction and remanding for a new trial, the Michigan Supreme Court held as follows:

> The impact of the prosecutor's official letter talking about life imprisonment to these poorly-educated Spanish-speaking people could scarcely be calculated to be anything but terrifying.
> ...
> The constitutional right of a defendant to call witnesses in his defense ... mandates that they must be called without intimidation.

Id. 406.

For purposes of a Pena violation, it makes no difference whether a prosecutor intimidates a witness to gain favorable testimony or to discourage damaging testimony, and it makes no difference

whether the witness is originally called by the prosecutor or the defense. People v Crabtree, 87 Mich App 722 (1979).

Moreover, federal courts have long disfavored threats which may alter the content of a witness's testimony or the witness's willingness to appear on behalf of the defendant in a criminal case. In an analogous situation, the United States Supreme Court has held that a trial court may not use unnecessarily strong terms or threatening remarks which tend to intimidate witnesses. Webb v Texas, 409 US 95, 93 SCt 351, 34 LEd2d 330 (1972). Where the court actively encourages or badgers a witness into remaining silent so as to "drive the defense witness from the stand," the due process clause has been violated. "The fact that [Witness] Noe was willing to come to court in petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Noe's refusal to testify." Subsequent cases have held that such badgering deprives a criminal defendant of his Sixth Amendment right to compulsory process for obtaining witnesses in his favor. United States v Vavages, 151 F3d 1185, 1188 (9th Cir 1998).

Even where a witness does persist in testifying, such threats also "disrupt the truth-finding process" by contorting the witness's testimony in response to the threat, thereby contorting the resultant evidence, making it less reliable. See e.g. Berg v Morris, 483 FSupp 179, 184-185 (ED Cal 1980). In Vavages, the Court found that a threat delivered by the prosecutor "directly to the witness during a personal interview" also violated Webb. Other courts have held that the conduct of prosecutors, like the conduct of judges, is unquestionably governed by Webb. United States v Thomas, 488 F2d 334 (6th Cir 1973); See also United States v Blackwell, 694 F2d 1325, 1334 (DC Cir 1982). In Blackwell, the court held that:

> [W]arnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify.

The inquiry as to a Webb violation is "extremely fact specific". Vavages, 151 F3d at 1190. Factors which determine whether or not a perjury warning has a coercive impact on a witness are as follows:

> (1) the manner in which the prosecutor or judge raises the issue,
>
> (2) the language of the warning,
>
> (3) the prosecutor's or judge's basis in the record for believing the witness might lie.
>
> (4) whether or not the warning itself indicates an "expectation" of perjury.

Vavages, 151 F3d at 1189. See also United States v Davis, 974 F2d 182, 182-188 (DC Cir 1992).

"Judges and prosecutors do not necessarily commit a Webb-type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury if his or her testimony differs from [sworn testimony] that he or she has given previously." United States v Smith, 997 F2d 674, 679-80 (10th Cir 1993). However, where, under the totality of circumstances, "'the substance of what the prosecutor communicates to the witness is a threat over and above what the record indicates is necessary and appropriate, the inference that the prosecutor sought to coerce a witness into silence is strong.'" United States v Pierce, 62 F3d 818, 832 (6th Cir 1995), quoting United States v Jackson, 935 F2d 832, 847 (7th Cir 1991). The prosecution "team", for purposes of a Webb violation, includes the officer or agent-in-charge of a case where he or she is acting at the prosecutor's "behest". United States v Thomas, 488 F2d at 334, 335. (6th Cir 1973).

Even more troubling are threats which combine charges of perjury with additional threatened prosecutions against the witness. Vavages, 151 F3d at 1190; See also Blackwell, 694 F2d at 1333-34 (threats of prosecution for other crimes, etc.). For example, in United States v Morrison, 535 F2d 223 (3d Cir 1976), the trial prosecutor subjected the witness to a "barrage of warnings" that her testimony might result in a perjury prosecution and could be used against her in the event that she was prosecuted for federal drug charges. Morrison, 535 F2d at 225-226 (warnings delivered to witness through defense counsel).

The Sixth Circuit has found several additional factors to be significant in the context of a Webb challenge: if warnings to the witness are repeated, or if they are accompanied by additional advice that to testify is against the witness's interest. United States v Arthur, 949 F2d 211, 215-216 (6th Cir 1991).

A judge's or prosecutor's coercion of a witness may "render the trial so fundamentally unfair as to violate due process under the United States Constitution." Duckett v Godinez, 67 F3d 734, 740 (9th Cir 1999), quoted in Hazen v Warden, California Correctional Institute, 1996 WL 241833 (ND Cal 1996). See also Berg v Morris, 483 FSupp at 184.

While the typical Pena-Webb challenge involves a witness who eventually succumbs at trial to a threat made by a prosecutor or a trial judge, testifying (or remaining silent) consistently with the advice of the prosecutor or judge, a reasonable application of those holdings dictates that the prosecution team in this case violated Mr. Carter's due process rights given the threats made to Mr. Palmer. The threat in this case was made by Officer Tett in the prosecutor's presence, as was evidenced by Palmer's trial statement: "I told you [prosecutor] to get him [Officer Tett] out of my face." (Palmer, Trial Tr 11/4/99, Vol IV, pp 146-148).

While Palmer remained steadfast in his actual trial testimony that Dominick Jones was the driver of the Blazer when it struck the Explorer, Palmer's taped statement was incriminating, it was used as evidence against the defendant, and it resulted directly from the threat to add "years" to Palmer's sentence on a parole violation or some other charge (even perhaps this vehicular homicide) if Palmer did not identify Mr. Carter as the driver. Because Palmer's taped statement was introduced at trial, the threats resulted in a Webb-Pena violation here which deprived the defendant of his due process right to a fair trial. At the end of this trial, jurors obviously chose Palmer's taped statement rather than his trial testimony, convicting Mr. Carter as the driver of the Blazer.

Moreover, the fact that the threat actually occurred could not be more clear. Mr. Palmer understood the threat made by the prosecution team, and he explained it in detail to jurors. The trial prosecutor confirmed the threat by taunting Mr. Palmer, saying "Bye" when Palmer refused to testify consistently with the prosecution's theory of the case.

The Michigan Court of Appeals found that this threat by the prosecutor did not deprive Mr. Carter of a fair trial. Opinion at *2.

Defendant maintains that this issue was adequately preserved in the trial court because counsel objected when Palmer was threatened in open court by the prosecutor. Alternatively, in the event this Court finds that trial counsel failed to object separately to the introduction of the tape, or failed to identify the incident between the prosecutor and Carl Palmer ("Bye") properly as a violation of the Supreme's Court's decision in Webb v Texas, 409 US 95, 93 SCt 351, 34 LEd2d 330 (1972), or failed to move for a mistrial, then Defendant maintains that ineffective assistance of counsel deprived him of a fair trial. Hicks, supra.

Here, the introduction of the Carl Palmer tape-recorded statement provided evidence as to the ultimate issue in a trial (the identity of the driver of the Blazer), where "a significant amount of evidence was presented from which a jury could have concluded that [the defendant] was not" the driver of the Blazer. See Hicks, 239 FSupp 2d at 710 (emphasis in original). The fact that this type of error has been held to warrant reversal in other cases itself demonstrates that counsel's omissions here constituted a "serious mistake" but for which the defendant would have had a reasonable chance of acquittal, reversal or retrial. Garcia, Degraffenreid, supra.

3. Failure to object to evidence regarding the defendant's consultation with counsel:

In this case, the prosecutor introduced the testimony of several witnesses to testify that the defendant had refused to participate in a line-up. Thereafter, even though jurors had already heard about the defendant's refusal, the prosecution offered the testimony of yet another witness. The following testimony was elicited by the prosecutor from jail deputy Thomas Zlydaszyk.

> When I initially spoke with him [defendant], he seemed hesitant, didn't appear like he wanted to participate, but I explained to him that there would be counsel for him to consult with prior to the lineup being held, that I would do my best to find guys that looked like him, and if he refused to participate in the lineup there would probably be a photo lineup held and the fact he refused could be admissible in court later on.
>
> Q Go on. What happened?
>
> A We got everybody assembled. **He spoke with the attorneys that were appointed to represent him, and he refused to participate.**

(Zlydaszyk, Trial Tr 11/4/99, Vol V, pp 37-38) (emphasis added). The defense objected prior to Zlydaszyk's testimony. (Id. pp 33-34).

While the defendant's refusal to participate in the line up was a fact that jurors could consider, People v Benson, 180 Mich App 433 (1989), the introduction of evidence regarding the defendant's consultation with counsel crossed the line into the impermissible area of evidence concerning the defendant's exercise of a constitutionally protected right.

A pretrial identification procedure has been deemed a significant stage of a criminal proceeding at which an accused has an absolute right to be represented by counsel. Powell v Alabama, 287 US 45, 53 S Ct 55, 77 LEd 158 (1932); Benson, supra. In a variety of other contexts, Michigan courts have held that conduct which directly or indirectly restricts the exercise of a constitutionally protected right will not be condoned. See People v BoBo, 390 Mich 355 (1973)(comment upon the exercise of right to remain silent). Similarly, police testimony and prosecutorial comment on defendant's withdrawal of an initial consent to talk with police without counsel present and as his refusal to sign a consent form for a search of this trunk have been held to be reversible error. People v Stephens, 133 Mich App 294 (1984).

In Stephens, the Court held as follows regarding the introduction of evidence of a defendant's refusal to sign the consent to search form:

> "[A]ppellant's assertion of his constitutional right not to have his privacy invaded without just cause was used against him to help establish guilt of the crime for which he was indicted. This is entirely impermissible. It would make meaningless the constitutional protection against unreasonable searches and seizures if the exercise of that right was allowed to become a badge of guilt."

Stephens, quoting from Bargas v State, 489 P2d 130, 132 (Alas, 1971).

For at least forty years, federal courts likewise have held that a defendant's assertion of a constitutional right cannot be used as evidence of a crime. Griffen v California, 380 US 609, 85 SCt

1229, 14 LEd2d 106 (1965) (prosecutorial comment on an accused's Fifth Amendment right not to testify).[8] In a case with direct application to the instant case, the Third Circuit has held that the Supreme Court's decision in Griffen bars prosecutorial comment on the exercise of the right to counsel. United States ex rel Macon, v Yeager, 476 F2d 613 (3rd Cir 1973). The test outlined by the Third Circuit involves a three-part analysis: (1) whether the remarks, in fact comment on a Sixth Amendment right, (2) whether the defendant was so harmed as to render the comment a constitutional error; and (3) whether that error was harmless under the appropriate Supreme Court standard. Macon, 476 F2d at 615. In the decades following the Macon decision, its holding has been applied in habeas corpus cases. Abu-Jamal v Horn, __ Supp2d __ 2001 WL 1609690, *94-95 (ED Pa); Zemina v Solem, 438 FSupp 455 (D SD 1977).

In this instance, the defendant's absolute right to confer with counsel at this pretrial line up was violated. The jury should not have been told that it was only after the defendant spoke with his attorneys that he decided not to participate. The inference sought by the prosecution -- that only guilty people need lawyers -- is a forbidden one. Moreover, this evidence also permitted jurors to draw an improper inference directly from the attorney-client consultation: i.e., that during the consultation, Mr. Carter may have told his counsel that he believed he would be identified in the line-up, and that as a result, counsel advised Carter not to participate. As in Bargas, the assertion of the right was used as a "badge of guilt" on the defendant. Thus, as in Bargas, the case must be remanded and a new trial ordered.

The Court of Appeals' analysis of this issue in Mr. Carter's case is misplaced.

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[8] In another context, the Court has held that the law forbids a forced election between two co-equal constitutional rights. Simmons v United States, 390 US 377, 88 SCt 967, 19 LEd2d 1247 (1968).

> Defendant admits that there is no constitutional right to forgo participation in a lineup. See People v Gunter, 14 Mich App 758, 759; 166 NW2d 33 (1968). While a defendant's constitutional rights may be violated if evidence is offered that he consulted a lawyer before exercising his constitutional right to remain silent, the constitutional right protected by this rule is the right to remain silent, not the right to counsel. Here, given that there is no constitutional right to forgo participation in a lineup, we conclude that evidence that defendant consulted with an attorney before declining the lineup did not give rise to an impermissible inference, because a negative inference drawn from a refusal to participate, whether at the suggestion of an attorney on one's own motion, is permissible. See generally People v Benson, 180 Mich App 433, 437-439; 447 NW2d 755 (1989), reversed in part on other grounds 434 Mich 903 (1990).

Court of Appeals Opinion, at 2. The Court's citation to the Benson decision reveals its confusion in this case. Benson did not focus on evidence of a defendant's exercise of the right to counsel in connection with his decision to refuse a line up. The evidence offered in Benson only involved the defendant's refusal to participate in the line up. Here, the prosecution introduced both the refusal to participate in the line up and the consultation with counsel.

In addition, the Court of Appeals found that trial counsel had objected only on relevancy grounds. As noted above, the failure to preserve an error properly as a constitutional violation can constitute ineffective assistance of counsel. Hicks, 239 FSupp2d at 712. In the event this Court finds that counsel's objection was inadequate, then Defendant maintains that he was deprived of the effective assistance of counsel for this reason as well.

4. Trial court's ruling during the 6.500 proceedings as to the ineffective assistance of trial counsel:

During the 6.500 proceedings, the trial court rejected all of the foregoing issues based upon a two-sentence analysis.

> ... [A]ll of the sub-issues alleging ineffective assistance of counsel; tainted jurors, testimony regarding the pretrial lineup, the conduct of the exam of witnesses by the prosecutor were all raised and rejected on direct appeal. No action by defendant's trial or appellate counsel would make any of these alleged shortcomings rise to the level of reversible error ...

Opinion at p 10.

However, this analysis ignores the Court of Appeals' findings during Mr. Carter's direct appeal: (a) that trial counsel failed to object and (b) that consequently, the more onerous "plain error" standard had to be applied to each of these challenges. Counsel's omissions were not harmless.

C. Ineffective assistance at sentence and on appeal:

As discussed above, Mr. Carter should not have been scored 100 points under the homicide sentence guidelines. His trial counsel failed to object at the time of sentencing and his appellate counsel failed to preserve this issue on appeal. This issue was raised by the defendant pro se in a motion for reconsideration filed in the Michigan Supreme Court.

The United States Supreme Court has held that "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." Gardner v Florida, 430 US 349, 358; 97 SCt 1197, 1205; 51 LEd2d 393 (1977). Moreover, the Court has held that "any amount of significant jail time has Sixth Amendment significance". Glover v United States, 531 US 198, 203; 121 SCt 696, 700; 148 LEd2d 604 (2001). For purposes of a Strickland ineffective assistance challenge, any increase in sentence resulting from an error in computing sentencing guidelines is per se prejudicial. Glover, 531 US at 200. See also People v Pickens, 446 Mich 278 (1994). Effective assistance requires that counsel make appropriate objections to improper

calculations of the sentencing guidelines. People v Miller, WL 718585 (Mich App)(unpublished and appended).

A defendant is also entitled to the effective assistance of counsel on appeal. People v Wolfe, 156 Mich App 225 (1986); Evitts v Lucey, 469 US 387; 105 SCt 830; 83 LEd2d 821 (1985). If the failure to raise a legitimate appellate claim during an initial appeal of right is due to counsel's ineffectiveness, no waiver has occurred and the reviewing court (in this instance this Court), may consider the claim as if on direct review. Wolfe, 156 Mich App 225 (1986).

As noted by the Tenth Circuit, even where the attorney presented a strong but unsuccessful claim on the first appeal, appellate counsel may still deliver a deficient performance and prejudice defendant by omitting a "dead-bang" winner which would have resulted in some relief to the client. United States v Cook, 45 F3d 388, 395 (10th Cir 1995); Matthews v Abramajtys, 92 FSupp 2d 615 (ED Mich 2000).

> [The] Sixth Amendment does not require an attorney to raise [each and] every nonfrivolous issue on appeal, and appellate counsel may engage in [the] process of winnowing out weaker arguments and focussing on those more likely to prevail, but counsel who has presented strong but unsuccessful claims on appeal may deliver a deficient performance by omitting a "dead bang" winner, which is an issue which was obvious from the trial record and one which would have resulted in reversal on appeal.

Cook, 45 F3d at 389-390. A "dead bang winner" has been defined as an error that (a) is obvious from the trial record, and (b) would have resulted in reversal on appeal. Cook, 45 F3d at 395; Hawkins v Hannigan, 185 F3d 1146, 1152 (10th Cir 1999). The error regarding the scoring of OV#3 meets both tests. Counsel for Mr. Carter obviously was made aware of the fact that 100 points were being added to his client's offense level. Moreover, counsel should have been aware by reading the

guideline itself that these points only are scored of the offense is a **non**-homicide, and obviously, second degree murder is a homicide. When something as significant as a 100-point change in the offense level is at stake, corresponding to a difference in more than 7 years on the minimum and 12 years on the maximum ends of the sentence guideline range, there could be no strategic reasons not to object. The Court in Miller found trial counsel ineffective on similar facts.

> [W]e can discern no possible strategy in defense counsel's failure to object to the trial court's erroneous scoring of the sentencing guidelines. The trial court added fifty additional points to the guidelines scoring, resulting in a significantly higher minimum sentence range.

Id. *2. The error meets the second test under Cook -- that it would have resulted in reversal on appeal -- because Mr. Crossley's appellate counsel raised this precise issue regarding OV#3 and won on appeal.

The Court in Crossley ruled that the failure to object to the misscoring of OV#3 amounted to ineffective assistance of counsel, and consequently, remand for resentencing was ordered. Appellate counsel's failure to secure comparable relief for Mr. Carter amounted to ineffective assistance of appellate counsel.

Appellate counsel can also deemed to be ineffective for any omissions relating to appellate counsel's litigation (during the direct appeal) of trial counsel's ineffectiveness with respect to the issues set forth in arguments II B-1, B-2 and B-3, supra. In other words, if the Court now finds (1) that there was error with respect to issues B-1, B-2 and B-3, (2) that trial counsel failed to perfect an objection with respect to these errors, (3) that trial counsel's omissions meet the Strickland standard for reversal, and (4) that appellate counsel should have raised these particular ineffective

assistance challenges to trial counsel's performance during direct appeal -- the Court could then find appellate counsel ineffective. See discussion and authorities cited at page 22.

RELIEF REQUESTED

For all of the foregoing reasons, Mr. Carter requests that this Court grant his application for leave to appeal in this case.

Respectfully submitted,

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